

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-7503

United States Court of Appeals
For the Second Circuit

SUSAN TANNENBAUM,

Plaintiff-Appellant,

against

ROBERT G. ZELLER, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE
CHEMICAL FUND, INC.

WALSH & FRISCH

*Attorneys for Defendant-Appellee
Chemical Fund, Inc.*

250 Park Avenue

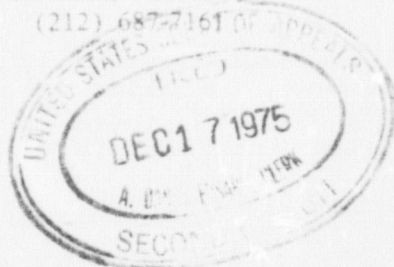
New York, New York 10017

(212) 687-7161

E. ROGER FRISCH

ROBERT D. MERCURIO
of Counsel

December 17, 1975



United States Court of Appeals
For the Second Circuit

SUSAN TANNENBAUM,
Plaintiff-Appellant,
against

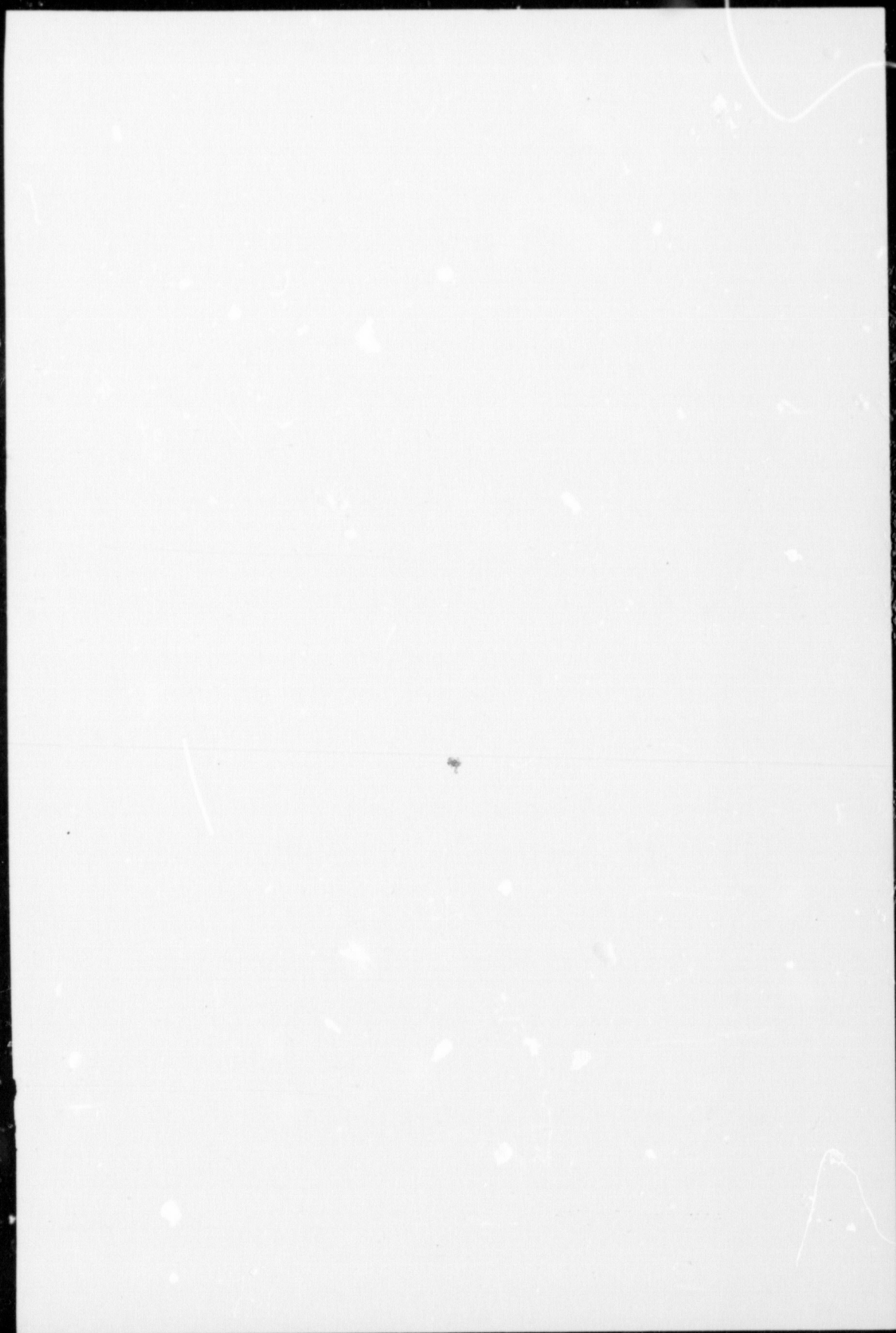
ROBERT G. ZELLER, *et al.*,
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BRIEF FOR DEFENDANT-APPELLEE
CHEMICAL FUND, INC.

This brief is submitted to set forth the position of defendant-appellee, Chemical Fund, Inc. (hereinafter "the Fund"). Since this action was purportedly instituted on behalf of the Fund, its counsel have participated in the defense of the action only to the extent necessary to protect the best interests of the Fund and its shareholders. Counsel has been instructed by the Fund's Board of Directors to submit this brief stating the Fund's position on the central issue in the action, that is, whether brokerage commissions on purchases and sales of portfolio securities were used in the best interest of the Fund or whether, conversely, the Fund should have sought to recapture portions of those brokerage commissions as suggested by plaintiff.

Although a reversal of the decision of the Court below could result in a money recovery by the Fund, it is the view of the Fund's Board of Directors that such a result



would not be in the long term best interests of the Fund and its shareholders, would be manifestly unjust and would undermine the proper exercise of responsibility by the Board.

At all relevant times, the Fund's Board of Directors was kept apprised of the possibilities of recapturing some part of the brokerage commissions paid by the Fund and actively considered whether or not to seek such "benefits" for the Fund. Although many factors weighed against recapture, the principal reasons for the Board's decision not to seek any recapture of brokerage commissions were its desire to obtain the best execution for portfolio transactions, to avoid the conflict of interest, real or apparent, inherent in recapture, to utilize commissions to promote sales of Fund shares (so long as that was permissible) and to obtain useful research information.

A great deal of evidence was adduced in this regard by the other defendants in the action which is contained in the record and not reviewed here. The Fund emphasizes that the decision not to seek recapture of brokerage commissions was a decision made by its Board of Directors, a majority of whom were concededly independent, as a matter of good faith business judgment.

Respectfully submitted,

WALSH & FRISCH

*Attorneys for Defendant-Appellee
Chemical Fund, Inc.*

250 Park Avenue

New York, New York 10017

(212) 687-7161

E. ROGER FRISCH

ROBERT D. MERCURIO

of Counsel

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